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No. 94-1941 and 94-2107

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

COMMONWEALTH OF VIRGINIA, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE CROSS-PETITIONERS

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QUESTION PRESENTED

Whether the Equal Protection Clause permits a State to offer a pedagogically beneficial single-sex college program as a complement to a large and diverse statewide system of public and private higher education that provides extensive and varied educational opportunities for both men and women.

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BRIEF FOR THE CROSS-PETITIONERS

Cross-petitioners the Commonwealth of Virginia, Governor George F. Allen, the State Council of Higher Education for Virginia, the Virginia Military Institute, its Board of Visitors and Superintendent, the VMI Foundation, Inc., and the VMI Alumni Association respectfully submit this brief in support of the constitutionality of the single-sex education component of Virginia's system of higher education.

INTRODUCTION

This case involves the circumstances, if any, under which

the Equal Protection Clause of the Fourteenth Amendment permits a State to support single-sex education at one or more of its institutions of higher education.

Virginia maintains a higher education system that is overwhelmingly coeducational, but which includes an option for a small number of students to attend a single-gender public college. Virginia also provides financial support for numerous private colleges, most of which are coeducational, but five of which have single-sex admissions policies.

This litigation was initiated by the United States to challenge the male-only single-sex admissions policy of the Virginia Military Institute (VMI) at a time when all of Virginia's other 14 public colleges were coeducational. The court below held that Virginia had established ample justification for a single-sex component in its diverse educational spectrum, but had not justified its determination to afford that opportunity to men and not women.

After that decision, Virginia created a single-sex college program for women, known as the Virginia Women's Institute for Leadership (VWIL), at Mary Baldwin College (MBC), a women-only private college. The courts below have now approved the constitutionality of Virginia's higher education system as presently constituted, with its predominantly coeducational emphasis and limited and comparable single-sex components for men and women.

In *United States v. Commonwealth of Virginia*, No. 94-1941, this Court granted the Government's petition for a writ of certiorari challenging the decision below. Cross-petitioners will defend that decision in their brief as respondents in No. 94-1941. The Court also granted cross-petitioners' conditional cross-petition for a writ of certiorari (No. 94-2107) challenging the initial determination by the court below that Virginia could not continue VMI as a male-only public college without establishing a comparable

facility for women. That issue will be addressed in this brief.[1]

Cross-petitioners maintain that the initial decision below concerning liability is not required by this Court's equal protection jurisprudence and will unduly and unnecessarily inhibit States in the development of programs to meet the special and demonstrated needs of their citizens. The liability ruling has the effect of precluding government-sponsored single-sex education for students of one gender absent a parallel program for students of the other gender. That standard does not permit States to take into account the pedagogical value of single-sex education for some students, the differing educational needs and interests of students, the judgment of educators in developing programs, the overall mix of educational options made available to students in the public and private sectors, or the importance of state and local discretion in devising beneficial and effective means of education for students of both genders within the financial constraints imposed on funding for education. For the reasons set forth in this brief, the court of appeals erred in restricting the ability of government to use single-sex educational programs as one part of a broad spectrum of educational approaches professionally designed to respond to the varied needs and preferences of students of all ages.

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[1]Cross-petitioners are committed by legislation to single-sex education as a beneficial pedagogical option for both men and women and intend to continue offering this option through VMI and VWIL even if this Court holds that parallel programs are not a prerequisite to a State's ability to offer the benefits of single-sex education to its citizens. Cross-petitioners merely seek to preserve the discretion of state and local governments to improve and diversify all levels of their educational systems through innovative and successful programs similar to those at VMI and VWIL.

OPINIONS BELOW

The opinion of the court of appeals regarding liability is reported at 976 F.2d 890, and is reproduced at pages 134a-157a of the appendix to the petition for a writ of certiorari in *United States v. Virginia*, No. 94-1941 (filed May 26, 1995) (hereinafter "Pet. App."). The opinion of the district court regarding liability (Pet. App. 158a-245a) is reported at 766 F. Supp. 1407. The opinion of the court of appeals regarding remedy (Pet. App. 1a-52a) is reported at 44 F.3d 1229. The opinion of the district court regarding remedy (Pet. App. 53a-131a) is reported at 852 F. Supp. 471.

JURISDICTION

The judgment of the court of appeals regarding liability was entered on October 5, 1992. That judgment vacated and remanded the case to the district court for further proceedings. Pet. App. 156a. This Court denied a petition for a writ of certiorari filed by cross-petitioners seeking interlocutory review of that judgment. *VMI v. United States*, 113 S. Ct. 2431 (1993) (No. 92-1213).

After remedial proceedings in the district court on remand, cross-respondent filed a notice of appeal, and cross-petitioners filed a timely notice of cross-appeal challenging the original finding of liability. The judgment of the court of appeals affirming and remanding the case for further proceedings (Pet. App. 30a) was entered on January 26, 1995.

On April 18, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 26, 1995. Cross-respondent the United States filed a petition on the latter seeking review of the judgment below. *See United States v. Virginia*, No. 94-1941. Cross-petitioners received that petition on May 26, 1995, and filed a timely cross-petition for a writ of certiorari on June 26, 1995, pursuant to this Court's Rules

12.3 and 13.5. This Court granted both the petition and the cross-petition on October 5, 1995. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

A. Background

1. Virginia's System of Higher Education

The Commonwealth of Virginia provides financial support for a "diverse array" of public and private colleges and universities. Pet. App. 187a. The State Council of Higher Education for Virginia (SCHEV) has declared that "'Virginia has always recognized that there are many kinds of excellence and has supported a diversity of missions among its institutions of higher education.'" *Id.* Indeed, "[o]ne special characteristic of the Virginia system is its diversity," and Virginia's colleges and universities "collectively form one of the most diverse -- and increasingly excellent -- systems of higher education in the nation." I DX 23 at 11 (I JA 1707).[2] In furtherance of this express

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[2] "I DX" refers to defendants' (*i.e.*, cross-petitioners') exhibits at the liability trial. "II DX" refers to cross-petitioners' exhibits at the remedy trial. "I Tr." and "II Tr." refer to the transcripts of the liability and remedy trials, respectively. "I JA" and "II JA" refer to the joint appendices filed in the court of appeals at the liability and remedy stages, respectively. "L." refers to the parties' joint lodging in this Court of materials from the record.

policy of providing a wide spectrum of educational opportunities and experiences, the Boards of Visitors of the various public colleges and universities in Virginia "have traditionally enjoyed, and now enjoy, broad autonomy in the determination of such issues as the institution's mission . . . and the composition of its student body." Pet. App. 187a; *see also id.* at 138a-39a. In short, "the hallmarks of Virginia's educational policy are 'diversity and autonomy.'" *Id.* at 187a.

There are more than a dozen public four-year undergraduate institutions in Virginia, including the University of Virginia (one of the Nation's leading universities) and other schools that have been recognized regionally or nationally for academic excellence. Pet. App. 185a-86a; Stipulations of Fact ("Stips.") 41-42 (I JA 86-87; L. 68-69).[3] These four-year institutions enrolled 85,441 women and 72,819 men in 1989. Pet. App. 187a.

Although almost all of Virginia's public colleges and universities are presently coeducational, Virginia has a long-standing tradition of supporting single-sex education. Most of Virginia's public colleges and universities originally offered single-sex education. Four of these public institutions -- Longwood College, James Madison University, Mary Washington College, and Radford University -- originally admitted women only. Pet. App. 175a n.10,

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[3]Virginia's public four-year undergraduate institutions include: Christopher Newport College, Clinch Valley College, College of William and Mary, George Mason University, James Madison University, Longwood College, Mary Washington College, Norfolk State University, Old Dominion University, Radford University, University of Virginia, Virginia Commonwealth University, Virginia Military Institute, Virginia Polytechnic Institute and State University, and Virginia State University. Pet. App. 185a-86a.

185a-87a. These institutions chose to become coeducational only in the late 1960's and early 1970's as a result of financial pressures and the growing popularity of coeducation. II Tr. 642, 660; *see also* I JA 173-75, 212-13.

The Commonwealth's sponsorship of public single-sex undergraduate programs is only one part of its overall support for single-sex education. Virginia has long recognized that "'[h]igher education resources should be viewed as a whole -- public and private.'" Pet. App. 191a; *see* Stips. 26, 28-32 (I JA 71, 73-77; L. 53, 55-59). The State Council is charged with the task of preparing and implementing a master plan for higher education in Virginia that takes into account the missions, programs, and enrollment of all institutions of higher education in the Commonwealth, both public and private, with the goal of providing diverse educational opportunities without unnecessary duplication. Stips. 86-87 (I JA 81-82; L. 113-14). Thus, "Virginia relies on its independent [*i.e.*, private] institutions [of higher education] to offer students choices and meet the educational needs of people in the Commonwealth." Pet. App. 191a.

There are approximately 36 private colleges and universities authorized to award undergraduate degrees in Virginia. II DX 16 at 109-37. Five of these institutions are four-year colleges that provide single-sex education. Hampden-Sydney College provides undergraduate education for men, while Randolph-Macon Women's College, Mary Baldwin College, Sweet Briar College, and Hollins College provide undergraduate education for women. In the fall of 1989, 3850 women and 2256 men were enrolled in public and private single-sex colleges in Virginia. Pet. App. 189a.

The Virginia Constitution itself recognizes the important role played by private educational institutions in enhancing the diversity of the Commonwealth's overall educational system. In the early 1970's, as Virginia's public women's

colleges were moving to coeducation, the people of Virginia twice amended their constitution to make clear that public funds could be used to support private higher education. Va. Const. art. VIII, § 11; Stips. 26-27 (I JA 71-72; L. 53-54). This provision has been recognized as "'an implicit endorsement of the principle of pluralism in higher education. Its value judgments are twofold: that if private institutions closed their doors, the Commonwealth would have to find the money to educate students who would otherwise have been in a private institution and Virginia's rich tradition of diversity in higher education would be notably weakened.'" Stips. 28 (I JA 73; L. 55).

The Virginia General Assembly has implemented this constitutional mandate through the Tuition Assistance Grant Program, the College Scholarship Assistance Program, and various other state-financed aid programs[4] that provide scholarship grants, guaranteed loans, and work-study funds for students attending private colleges in Virginia, including single-sex colleges. Pet. App. 190a-91a; Stips. 55-59 (I JA 100-04; L. 82-86). In addition, the Commonwealth provides financial support and other assistance to private institutions (including single-sex colleges) through low-cost building loans, state-funded services contracts, and other programs. Stips. 54-55, 59-60, 62-63 (I JA 99-100, 104-05, 107-08; L. 81-82, 86-87, 89-90); Va. Code §§ 23-30.39 to -30.58. The State Council of Higher Education views these programs as a "means by which the Commonwealth can provide funding to its independent

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[4]*See, e.g.*, Va. Code §§ 23-38.11 to -38.18 (Tuition Assistance Grant Act); *id.* §§ 23-38.30 to -38.44:3 (Virginia Student Assistance Authorities); *id.* §§ 23-38.45 to -38.50 (College Scholarship Assistance Act); *id.* §§ 23-38.53:1 to -38.53:3 (Virginia Scholars Program); *id.* §§ 23-38.70 to 23-38.71 (Virginia Work-Study Program).

institutions, thereby helping to maintain a diverse system of higher education." I DX 21 at 10 (I JA 1694) (SCHEV Budget Initiatives for 1990-1992: A Concept Paper).

In the aggregate, Virginia's financial support for private single-sex education for women is substantial. I DX 74 (I JA 1971-80; L. 235-45); II DX 13 & 14. This aid "'demonstrates the Commonwealth's commitment to private higher education'" and "'is as much of an institutional support program as it is a program to assist students.'" Stips. 56 (I JA 101; L. 83).

As part of its broad and varied educational system, Virginia offers college students the option of military training through participation in federally funded Reserve Officer Training Corps (ROTC) programs at several public colleges and universities in Virginia, including the University of Virginia, Virginia Polytechnic Institute and State University, VMI, Norfolk State University, Old Dominion University, and James Madison University. Stips. 46-47 (I JA 91-92; L. 73-74). In addition, students at several private colleges in Virginia, including all of the private four-year women's colleges, have the option of participating in ROTC programs. *Id.*

Yet another aspect of Virginia's broad menu of higher education choices is the coeducational residential Corps of Cadets program at Virginia Polytechnic Institute and State University (VPI). VPI is a large public coeducational university that has been listed among the Nation's finest undergraduate institutions. Stips. 42 (I JA 87; L. 69). VPI has more academic course offerings and undergraduate degree programs than VMI, and offers all of the courses (including military instruction) available at VMI. Pet. App. 168a; Stips. 42 (I JA 87; L. 69); I DX 62D, 62E, 62M (I JA 1780-81, 1789; L. 231, 234).

VPI's Corps of Cadets enrolled approximately 360 stu-

dents, including 45 women, in 1993. II DX 88 (L. 344). The mission of the VPI Corps of Cadets is "to produce men and women . . . who are honorable, educated and trained for military service to their country and prepared to be effective leaders in the varied work of military and civil life." Pet. App. 214a.

VPI cadets are required to adhere to military-type regulations and discipline. The Corps of Cadets is organized along military lines, with a chain of command based on a cadet rank system. Cadets are awakened with reveille each morning at 5:30 a.m., march together in formation each day to breakfast and dinner, and participate in scheduled and unscheduled room inspections, uniform inspections, formations, roll calls, and military drills. Pet. App. 217a; Stips. 49, 51 (I JA 94, 96; L. 76, 78).

2. Virginia Military Institute

VMI was founded in 1839 and is a small public four-year college with an enrollment of about 1250 students. It offers majors in the liberal arts, sciences, and engineering. All of its academic offerings are also available at other public colleges and universities in Virginia. Pet. App. 168a; I DX 62C, 62D, 62E, 62M (I JA 1779-81, 1789; L. 230-31, 234).

VMI's mission is "to produce educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." Pet. App. 203a. VMI employs an "adversative" method for developing character and leadership in young men. That method is intended to cause students to question their past convictions, values and experiences and thereby to prepare them to accept the values and behavior taught by VMI. *Id.* at 175a n.10, 189a, 191a-92.

"Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior,

and indoctrination in desirable values are the salient attributes of the VMI educational experience." Pet. App. 191a-92a. First-year VMI students are subjected to an extreme form of the adversative model, "comparable to Marine Corps boot camp in terms of both the physical rigor and mental stress of the experience." *Id.* at 194a-95a.

VMI utilizes a "class system" which assigns specific privileges and responsibilities to each class of cadets in order to develop character and leadership. Thus, the first class, or seniors, are responsible for providing overall leadership, writing the standard operating procedures for aspects of the adversative system, and serving as mentors to new cadets. "The class system is a very highly-developed system for cultivating leadership," as it "teaches and reinforces through peer pressure the values and behaviors that VMI exists to promote." Pet. App. 196a.

Cadets at VMI are subject to an honor code, which provides that a cadet "does not lie, cheat, steal nor tolerate those who do." Pet. App. 197a. The honor code "dominates all facets of institutional life" and is enforced by an "honor court" made up of cadets elected by their classmates. *Id.*

Students at VMI live in a four-story barracks housing one class per floor. "There is a total lack of privacy" in the barracks: there are no door locks or window shades, and the doors to the students' rooms contain windows that permit "the officer in charge to . . . see every cadet without anything being hidden." Pet. App. 198a-99a. The barracks features group bathrooms[5] and "close and intimate

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[5]There is one bathroom on each floor, serving up to 400 students. Each bathroom has group showers with about 24 heads. There are no doors on the partitions separating each toilet. Pet. App. 128a, 240a.

quarters." *Id.* In short, "there is literally no place in the barracks that physically affords privacy," and students are thus "under constant scrutiny." *Id.* at 198a, 199a. This total lack of privacy and constant supervision by the entire Corps is an integral part of the VMI experience. *Id.* at 199a.

Strict egalitarianism is a central and essential attribute of the VMI method. "The VMI experience is based on absolute equality, which is achieved through treating everyone in exactly the same way." Pet. App. 237a. The spartan and public nature of life in the barracks "is an aspect of the egalitarian ethic at VMI," as is the fact that VMI imposes the same physical requirements on all students, regardless of ability. *Id.* at 198a, 233a. Every effort is made to subordinate physical or material distinctions among cadets by requiring all cadets to wear the same uniforms, live in the same spare quarters, attain the same level of physical fitness, and undergo the same constant scrutiny by the other cadets.

Unlike the federal military academies, which exist to prepare their graduates for career service in the armed forces, VMI "is directed at preparation for both military and civilian life." Pet. App. 219a. Thus, VMI's military emphasis is primarily a teaching device, designed to serve "the function of teaching self-discipline," and "is a means to an end, not an end in itself." *Id.* at 206a. Although each VMI student must participate in an ROTC program that provides the same training for a military career as the ROTC programs offered at other undergraduate institutions in Virginia, only 15 percent of VMI graduates choose military careers, and "VMI has gone to considerable lengths to assure the public that it is not simply a military college." *Id.* at 219a.

VMI "has been successful in accomplishing [its] goals; specifically, instilling physical and mental discipline, char-

acter, and a kind of moral code." Pet. App. 204a. Indeed, "[t]he school's success and reputation are uncontroverted." *Id.* at 138a. "[A]ll parties . . . acknowledge . . . the positive and unique aspects of the program." *Id.* at 137a.

In 1983, VMI's Board of Visitors created a Mission Study Committee to reexamine the appropriateness of VMI's single-sex admissions policy. A majority of the Committee's members (including the president of a women's college) did not graduate from VMI. The Committee reviewed materials on education and women in the military and made site visits to single-sex and newly coeducational institutions. Pet. App. 208a-12a. After a three-year study, the Committee issued its final report in 1986. *Id.* at 212a. The Committee "found that the admission of women into the VMI Corps of Cadets would alter the mission of VMI" and would require adjustments "in the military and physical demands made upon male cadets" that "contribute to the ethos of which the Virginia Military Institute is proud and which, it is firmly believed, contributes to the unity of the Corps." *Id.* at 212a, 213a-14; I DX 40 at 2 (I JA 1721; L. 196).

The Committee also examined the reasons given by other institutions for changing from single-sex to coeducational status and "found that none of the motivating factors of the other institutions applied to the VMI mission." Pet. App. 214a. On the basis of these findings, the Committee recommended "that VMI should continue to adhere to its mission as an all-male institution." I DX 40 at 2 (I JA 1721; L. 196).

VMI also conducted a comprehensive self-examination "as part of its accreditation by the Southern Association of Colleges and Schools" in 1986. Pet. App. 173a, 213a. The Report of the Reaffirmation Committee of the Commission on Colleges for the Southern Association of Colleges and Schools specifically commended VMI for its

"'thorough'" review of its mission and purpose. Pet. App. 213a.

VMI's Board of Visitors ultimately decided to retain VMI's single-sex admissions policy. Pet. App. 173a, 214a. This decision was reached only after "reasoned and careful analysis" of the findings of the foregoing studies. *Id.* at 214a.

B. Initial Proceedings Below

1. The District Court's Liability Decision

The United States brought suit against Virginia and VMI in 1990, seeking admission of women to VMI. After trial, the district court found for cross-petitioners. Applying this Court's decision in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), the district court examined whether VMI's single-sex admissions policy "'serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives.'" Pet. App. 165a. After "a fact-intensive examination of the practical considerations underlying the challenged policy," *id.* at 166a, the district court concluded that VMI's policy satisfied the requirements of *Hogan*.

Based on extensive expert testimony and academic studies, the court found that a "substantial body of 'exceedingly persuasive' evidence supports VMI's contention that some students, both male and female, benefit from attending a single-sex college." Pet. App. 168a; *see id.* at 167a-70a, 174a, 176a, 225a-27a. This finding was based on the testimony of renowned education experts, including Harvard University sociology professor David Riesman and Richard C. Richardson, Jr., Professor of Educational Leadership and Policy Studies at Arizona State University. Pet. App. 180-81a. As the court explained, that expert testimony demonstrated conclusively that "[f]or many men,

a single-sex college is optimal," because "[a]t an all-male college, adolescent males benefit from being able to focus exclusively on the work at hand, without the intrusion of any sexual tension." *Id.* at 225a.

The district court also found that VMI's adversative method in particular is beneficial to some adolescent males. Pet. App. 203a-06a, 223a-25a.[6] As Dr. Riesman testified, VMI's emphasis on absolute equality "reduces the inherited characteristics of students in terms of wealth, position, name, ethnicity, and race to the lowest common denominator," such that "there are no outsiders at VMI. Everyone is an insider. Everyone is on the same level." Riesman Dep. (I DX 60) at 41, 48 (I JA 177, 184). The VMI method infuses cadets with self-discipline and, as a consequence, "inculcates the value of orderliness, of dedication, . . . of honor, and integrity, of high seriousness, in which everything is serious." Riesman Dep. at 45 (I JA 181). In sharp contrast to society in general and many modern undergraduate institutions, VMI "requires that the student discipline himself, to endure pain, physical and psychological, to meet timetables," thereby ensuring that VMI cadets "emerge as self-disciplined people." Riesman Dep. at 50-51 (I JA 186-87).

The testimony of the other education experts was to the same effect. Clifton Conrad, the Government's expert, explained that VMI "is an institution that has a very powerful ethos, a compelling institutional culture," and it "has nourished and cherished, communicated what it is to so many people in a very, very powerful way." I Tr. 354.

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[6]These findings refer to the developmental characteristics of college-age students, and reflect the sensitive and sometimes difficult nature of the transition from late adolescence to adulthood that such students experience.

The VMI method envelops VMI cadets in "a kind of life, a holistic life, if you will, in which people[] are required to answer a number of obligations [and] . . . responsibilities almost at the same time. And through that kind of immersion in a closed system, they develop over a period of time . . . a certain ability to function effectively under conditions of stress and demands and challenge later on in life." I Tr. 992 (Bunting).

Based on the testimony of these experts, the district court concluded that "VMI has done a very good job of conveying its goals and its values, and has been successful in accomplishing those goals; specifically, instilling physical and mental discipline, character, and a kind of moral code." Pet. App. 204a. The district court further found that "key elements of the adversative VMI educational system . . . would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were . . . to make [the] changes necessary to accommodate" women students. *Id.* at 167a. Making VMI coeducational would require substantial changes to crucial aspects of VMI's educational method, including the rigorous physical training program[7] and the constant scrutiny and total lack of privacy in the barracks.[8] The fact

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[7]*See* Pet. App. 233a ("If women were admitted to VMI, it would be necessary to change certain physical training program courses and to set different standards. . . . Either [some aspects] would have to be abandoned, or there would have to be accommodations that would result in a dual track for women."); *id.* at 234a ("If VMI were coeducational and females were subjected to the same physical demands as male cadets, females would suffer on the order of 300% more injuries than males."); *id.* at 221a.

[8]Pet. App. 233a ("Adaptations would have to made in order to provide for individual privacy, for the sake of the men as well as for the sake of the women. . . . The introduction of privacy

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that these changes would occur "is well-founded in empirical evidence, and not based on an archaic stereotype." *Id.* at 171a.

The changes that would result if VMI became coeducational would necessarily lead to differential treatment of distinct groups of VMI students on the basis of gender, thereby contradicting VMI's core principle of absolute equality of treatment.[9] Moreover, coeducation "would produce cross-sex relationships among cadets that would significantly alter the character-building and leadership-development aspects of the VMI experience." Pet. App. 239a. As a result, VMI could not continue to utilize the same program if it were to become coeducational: "it would be impossible for a female to participate in the 'VMI experience,'" because "her introduction into the process would change it. Thus, the very experience she sought would no longer be available." *Id.* at 175a; *see also id.* at 176a, 227a.

On the basis of these findings, the district court concluded: (1) that the "virtually uncontradicted" evidence supports "Virginia's view that substantial educational benefits

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required by admission of women at VMI would contradict the principle that everyone is constantly subject to scrutiny by everyone else.").

[9]Pet. App. 237a ("The VMI experience is based on absolute equality, which is achieved through treating everyone in exactly the same way. . . . Given the actual physiological, psychological, and sociological differences between males and females, it would be impossible to treat everyone fairly by continuing to treat them the same if women were admitted to VMI. Equal treatment would necessarily give way to fair treatment, thus undermining egalitarianism.").

flow from a single-gender environment" and that those benefits "cannot be replicated in a coeducational setting," Pet. App. 176a; (2) that VMI's admissions policy "adds a measure of diversity to Virginia's overall system of education that would be missing if VMI were coeducational," and that this "diversity is further enhanced by VMI's unique method of instruction which was applauded by all of the educational experts who testified," *id.* at 176a; and (3) that VMI's admissions policy satisfies the requirements of *Hogan* because it is substantially related to the important state objectives of increasing educational diversity and providing the substantial educational benefits of single-sex education and the VMI method, *id.* at 173a, 176a-77a.

2. The Court of Appeals' Liability Decision

The court of appeals affirmed the district court's findings of fact. In particular, the court of appeals upheld the district court's findings that "VMI's unique methodology justifies a single-gender policy" and that "the record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system . . . even more so." *Id.* at 151a; *see id.* at 137a, 150a, 155a.

The court also affirmed the district court's findings "that VMI's mission can be accomplished only in a single-gender environment and that changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology." Pet. App. 148a. The court explained that coeducation would require creation of "a dual track physical training program" which would, in turn, lead to perceptions of unequal treatment, jealousy, and resentment. *Id.* at 146a-47a. The total lack of privacy engendered by the barracks system would no longer be possible. *Id.* at 147a. And the VMI system would be unable to accommodate the cross-sex confrontation and harassment

that would necessarily occur if VMI attempted to maintain its adversative method in a coeducational setting. *Id.*[10] The court of appeals accordingly concluded that the admission of women to VMI "would deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation." Pet. App. 148a.

Nonetheless, the court of appeals vacated the judgment of the district court, holding that VMI's policy of admitting only men was unconstitutional because the Commonwealth did not provide a justification for not offering a similar type of educational program exclusively to women. *Id.* at 151a-54a. The court remanded the case to permit the Commonwealth to formulate an acceptable remedy such as "establish[ing] parallel institutions or parallel programs." *Id.* at 156a. This Court denied a petition for a writ of certiorari by cross-petitioners seeking review of the court of appeals' liability determination. *VMI v. United States*, No. 92-1213.[11]

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[10]The court of appeals expressly rejected the Government's claim that this finding was based on stereotyping: "the evidence supported the district court's finding that cross-sexual confrontation and interaction introduces additional elements of stress and distraction which are not accommodated by VMI's methodology." Pet. App. 147a.

[11]On remand, after consultation with education experts, the Commonwealth reaffirmed its commitment to single-sex education and diversity in its higher education system. Accordingly, Virginia decided to establish a state-sponsored leadership education program for women. After careful study, Mary Baldwin College, a private, women-only college, created and implemented the VWIL program with funding and support from the Commonwealth and the VMI Foundation. Pet. App. 63a, 103a-04a. The district court found that VWIL is designed by professional educators to achieve for women the same objectives and outcomes that VMI achieves for men, and

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SUMMARY OF ARGUMENT

Under this Court's decision in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), a public school's single-sex admissions policy is constitutional if it "serves important governmental objectives" and is "substantially related to the achievement of those objectives." *Id.* at 724. This Court has recognized that providing diverse educational opportunities is one of the most important objectives of state and local governments. The record in this case conclusively establishes that, as an alternative to a full range of coeducational offerings, single-sex education provides important educational benefits to students who choose it at the elementary, secondary, and undergraduate levels.

Virginia has a long history of support for single-sex education for men and women. Not only does Virginia provide the benefits of single-sex education at VMI, but through a variety of means, including the state's Tuition Assistance Grant Program, Virginia has historically provided substantial financial assistance to students (primarily women) who attend private single-sex colleges in the Commonwealth. Virginia is likewise committed to single-sex education at the elementary and secondary school level. Indeed, the Virginia General Assembly recently authorized local school boards to offer single-sex classes in the state's public schools. *See* Va. Code § 22.1-212.1:1. The existence of single-sex programs necessarily enhances

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accordingly concluded that the mandate of the court of appeals had been satisfied. *Id.* at 53a-131a. The court of appeals affirmed. *Id.* at 1a-52a. Cross-petitioners will address the remedial issues in their brief as respondents in No. 94-1941.

educational diversity in the Commonwealth and provides an educational option that is exceedingly beneficial to some young people.

The record also establishes beyond dispute that VMI provides additional educational benefits to its male students by virtue of its adversative method of education. The meticulous record and comprehensive findings in both courts below establish that the benefits of that method, like the benefits of single-sex education generally, can be attained only in a single-sex environment. In short, requiring VMI to become coeducational would deny the benefits of single-sex education *and* the VMI method to VMI's students without extending those benefits to anyone else.

The court of appeals nonetheless held that a State can provide single-sex education to students of one gender only in the context of a comparable single-sex program for students of the other gender, regardless of student needs and preferences, the professional judgment of educators, or available public resources. This formulaic analysis is erroneous as a matter of constitutional law and educational policy, and it sets a troublesome precedent that, unless reversed by this Court, will stifle experimentation with single-sex education by state and local governments nationwide.

The court of appeals' decision misapplies this Court's decision in *Hogan*. The Court's opinion in that case conducts a detailed factual analysis of the justification for the single-sex admissions policy at a state nursing school for women. The Court's opinion attached *no* constitutional significance to the absence of an all-male nursing school. *Id.* at 720 n.1. Instead, the Court found the single-sex admission policy unconstitutional because, among other things, that policy was based on the "mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women," and was not "necessary to reach any

of [the school's] educational goals," since the school already permitted men to attend classes and thus could not claim to provide the benefits of single-sex education. *Id.* at 726, 731.

In sharp contrast, VMI's single-sex admissions policy is based on sound and well-established pedagogical principles and firmly rooted in fact. And it is directly and substantially related to achieving the important and legitimate benefits of educational diversity, including single-sex education and the VMI method, in a context in which ample single-sex educational opportunities are available for women with public financial assistance, and where a publicly financed coeducational military program already exists. The court of appeals departed from *Hogan* by failing to recognize that these features of Virginia's policies and educational system demonstrate conclusively that Virginia readily satisfies the *Hogan* test.

Instead, the court of appeals erroneously imposed an additional requirement that a State offering a single-sex educational program for members of one gender must provide a comparable program for the other gender as a matter of course. This additional requirement places public educational policy in a constitutional straitjacket and will inhibit States and their political subdivisions from responding to heterogeneous and changing student needs and preferences. For example, the court of appeals' analysis effectively precludes school districts from offering single-sex programs for inner-city youths even though research shows that they are greatly at risk and might benefit from single-sex education options.

Requiring States to offer two single-sex programs in order to justify the continued existence of one program of proven excellence produces only a superficial and formalistic equality while sacrificing the ability of professional educators to respond in the most effective and flexible ways

to the challenge of education in the real world. Under the court of appeals' reasoning, the single-sex programs at schools like VMI and VWIL would become unconstitutional as soon as one or the other ceased to operate or became coeducational because of the needs, interests, or desires of the students attending that school, or because there was an excess of private-sector alternatives for the members of one gender or the other.

The constitutionality of one single-sex program should not turn on the ebb and flow of student interest in or demand for another single-sex program. A State should not be forced to choose between terminating a successful program and wasting scarce resources to sustain an unwanted and perhaps unnecessary parallel facility for students of the opposite gender.[12] Nor should States face endless constitutional litigation over the comparability of parallel programs.

Viewed independently, single-sex programs like the one at VMI (and at VWIL) pass constitutional muster under *Hogan*. That is all the Constitution requires. The court of appeals erred in requiring more.

ARGUMENT

I. PUBLICLY SPONSORED SINGLE-SEX EDUCATIONAL PROGRAMS ARE CONSTITUTIONALLY PERMISSIBLE IF THEY ARE SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF AN IMPORTANT GOVERNMENTAL OBJECTIVE

In *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), this Court applied intermediate scrutiny in review-

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[12]In voicing these concerns, cross-petitioners are looking beyond the immediate case involving VMI and VWIL, both of which are valuable and desirable.

ing an equal protection challenge to a public university's policy of admitting only members of one gender to a particular educational program. Under the two-pronged test standard applied by the Court in *Hogan*, a gender-based classification is permissible if (1) "the classification serves 'important governmental objectives'" and (2) "'the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" 458 U.S. at 724.

As the Solicitor General has acknowledged (94-1941 Pet. 19; 94-2107 Br. in Opp. 5 & n.2), the constitutionality of Virginia's single-sex educational programs must be judged under the *Hogan* standard. Accordingly, the question for decision here is whether VMI's single-sex admissions policy is substantially related to the achievement of an important government objective.

II. VMI'S SINGLE-SEX ADMISSIONS POLICY ADVANCES IMPORTANT GOVERNMENTAL OBJECTIVES

A. Providing The Benefits Of Single-Sex College Education And Accomplishing The Objectives Attainable Under The VMI Method Are Important Governmental Objectives

There can be no doubt that providing diverse and pedagogically beneficial opportunities at all educational levels constitutes a legitimate and important governmental objective. "Public education, like the police function, 'fulfills a most fundamental obligation of government to its constituency,'" and "'education is perhaps the most important function of state and local governments.'" *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). As this Court explained in *Norwood v. Harrison*, 413 U.S. 455, 462-63 (1973), government has a "special interest in elevating the quality of education in both public and private schools."

Individuals differ widely in the means by which they may be most effectively stimulated and educated. Therefore, diversity in educational approaches is a legitimate and important goal for government agencies seeking to maximize educational benefits for their citizens. Indeed, as this Court has recognized, "[n]o area of social concern stands to profit more from a multipiicity of viewpoints and from a diversity of approaches than does public education." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 50 (1973); *accord Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 773 (1973) ("We do not doubt -- indeed, we fully recognize -- the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools."). And, this Court has also recognized that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were actually alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

It is equally important to vest educators with the freedom to choose among educational alternatives and to use flexible approaches in responding to student needs. Educators must be given latitude to learn from experimentation and to evolve programs to meet student needs. In the primary and secondary school context, for example, "local autonomy has long been thought essential . . . to the quality of the educational process," *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974), and the same is true in higher education. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("'To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.'"); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment) (a university must be free to "'determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study'").

Single-sex educational programs provide a materially more effective learning environment for significant numbers of students and complement the diversity and educational benefits offered by a State's primarily coeducational system of higher education. Thus, the governmental objective of providing such programs is unquestionably legitimate and important. The record and findings in this case conclusively demonstrate that single-sex education and the VMI method provide meaningful and pedagogically valid educational benefits to the students who choose to attend VMI.

The district court found, based on extensive expert testimony and empirical studies, that for some students, "the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement." Pet. App. 168a. In particular, "[f]or many men, a single-sex college is optimal." *Id.* at 225a (citing Riesman Dep. 39). The court of appeals agreed that the effects on both genders of single-sex education "is almost uniformly positive." *Id.* at 149a. This finding was "amply" supported by the testimony of the nation's leading experts, as well as extensive scholarly research. *Id.* at 149a.

In fact, the Government's education expert agreed with this proposition as well. Dr. Conrad testified that "I'm a believer in single sex education, it has great virtues in lots of ways for lots of people, under lots of conditions." I Tr. 373 (I JA 621). The court of appeals added that single-sex education also had "salutary consequences for sexual equality in the job market" and that students in single-sex colleges "were more likely to set aside initial, stereotypical job aspirations." Pet. App. 149a. Thus, single-sex education performs a valuable service in uprooting inaccurate stereotypes. "The experts for both sides in this case" agreed with these conclusions. *Id.* at 150a.

In addition to the conceded benefits of single-sex

education in general, VMI's methodology has proven to be particularly beneficial to the adolescent male students it attracts. The district court found that VMI "has been successful in . . . instilling physical and mental discipline, character, and a kind of moral code" in its students. Pet. App. 204a. "The VMI experience promotes the development of qualities" such as "[s]elf control, self discipline, and the belief that you must subordinate your own personal desires and well-being to the good of the whole unit." Pet. App. 206a, 207a. VMI "takes students [who] are average from an academic perspective, and through the character development program, graduates people who have more than average commitment and motivation as well as character." *Id.* at 206a.

The court of appeals twice affirmed the district court's extensive factual findings regarding the demonstrable and substantial benefits of single-sex education generally and the VMI method in particular. As the court of appeals explained, the "record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system . . . even more so." Pet. App. 151a. Based upon the extensive record, including testimony by the Nation's leading experts, the court declared: "[t]hat single-gender education at the college level is beneficial to both sexes is a fact established in this case." *Id.* at 20a.

As the foregoing discussion demonstrates, it is common ground in this case that single-sex college education provides unique educational benefits for some college-age students, and that the VMI method provides additional educational benefits for certain students. The expert testimony at trial, the district court's findings, and the court of appeals' affirmance of those findings foreclose any challenge to those propositions at this stage of the case. It necessarily follows that Virginia's commitment to providing these benefits to its citizens is a valid and important govern-

mental objective.

B. Virginia Has Thoughtfully, Reasonably, And Carefully Structured And Implemented Its Decision To Provide Its Citizens With The Benefits Of Single-Sex Education And The VMI Method

The Commonwealth of Virginia has thoughtfully and reasonably chosen to provide the benefits of single-sex education and the VMI method as components of its diverse system of higher education. The district court found that "[t]he Commonwealth of Virginia has an avowed policy of offering a diversity of choices in higher education." Pet. App. 81a. The Virginia General Assembly and the State Council of Higher Education for Virginia have consistently reaffirmed the importance of maintaining that diversity.[13]

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[13]The State Council's biennial plans have repeatedly emphasized the importance of diversity in educational methodology, curriculum, and techniques in higher education. *See, e.g.*, I DX 24 at 23 ("Virginia's special programs to emphasize institutional initiative and experimentation continue to attract national attention"); I DX 26 at 7 ("The goals of Virginia's state-supported system of higher education have been set and remain unchanged. The strategies for achieving those goals through a multi-tiered, highly diverse set of institutions which offers access to virtually every kind of higher educational program and service, are in place"); I DX 28 at 6 ("There is probably no state in the union with independent and state-supported colleges and universities as diverse, and as excellent as Virginia's. . . . The [State] Council urges support of a coordinated system of colleges and universities so that the strength of diversity is complemented by that of carefully coordinated system-wide planning. The Council also urges renewed support of the tradition of college and university autonomy which is a hallmark of Virginia higher education."); I DX 30 at 12, 17 (including within Virginia's "Goals for Higher Education" the intention "to protect and enhance the institutional diversity which exists within Virginia's system of higher education" and "to guarantee the essential autonomy

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As the Council has explained, "Virginia has always recognized that there are many kinds of excellence and has supported a diversity of missions among its institutions of higher education." Stips. 38 (I JA 83; L. 65). Similarly, the 1990 Report to the Governor and General Assembly of the Commission on the University of the 21st Century "urge[s] that the hallmarks of Virginia higher education -- autonomy and diversity -- be maintained in the future." I DX 7 at 36 (I JA 1479). The Virginia Constitution itself contains "'an implicit endorsement of the principle of pluralism in higher education'" by authorizing public financial support for private colleges and universities. Stips. 28 (I JA 73; L. 55).

One of the means by which the Commonwealth has pursued its policy of diversity in higher education is through the authority granted to the governing boards of the several component institutions. The State Council of Higher Education believes as a policy matter that "responsibility to execute general state policy . . . should be decentralized to the greatest extent possible," II DX 16 at 12 (1991 Plan), so that individual creativity and experimentation will be encouraged.[14] In keeping with that policy, the Virginia General Assembly has delegated to each institution responsibility to determine policies of central importance to its respective mission and programs,

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and character of each institution"); *id.* at 6, 8, 45-46; Stips. 37-38 (I JA 82-83; L. 64-65).

[14] *Accord* I DX 30 at 45 ("Institutions will exhibit greater imagination and capability in dealing with their special opportunities and problems when a maximum of authority consistent with system-wide goals and priorities is vested at the institutional level.").

including admissions policies. *See* Va. Code § 23-9.6:1(2); L. 356. As a result, "'[t]he formal system of higher education in Virginia includes a great array of institutions,'" including "'state-supported and independent,'" "'research and highly specialized,'" and "'single-sex'" schools. Stips. 37-38 (I JA 82-83; L. 64-65) (quoting 1990 Report).

As explained above, several of Virginia's public colleges and universities originally offered single-sex education for women. Pet. App. 175a n.10, 185a-87a. In recent years, however, these institutions decided to become coeducational because of the popular trend in favor of coeducation and the financial pressures caused by that trend. II Tr. 642, 660; *see also* Reisman Dep. 37-39, 76-77 (I JA 173-75, 212-13). Thus, Virginia was without public single-sex higher education for women for the period between 1972 and 1995, an historical anomaly that has disappeared with the creation of VWIL.

Like the governing boards of the other public institutions of higher education in Virginia, VMI's Board of Visitors exercises authority to determine its admissions policy, subject to the General Assembly's ultimate authority to change that policy if it so chooses. Va. Code §§ 23-92, -104. After careful consideration of VMI's admissions policy during the 1980's, VMI's Board of Visitors decided to retain VMI's single-sex admissions policy. As the district court explained, this decision was based on the absence of significant interest among women for access to the VMI method and on the fact that turning VMI into a coeducational institution would irrevocably change VMI's unique mission and program and end its ability to provide students the benefits the VMI system was designed and developed to afford. Pet. App. 212a-14a. Thus, as the district court found, VMI's single-sex admissions policy "has been continued only after reasoned and careful

analysis by the Board of Visitors," the body authorized by the Commonwealth to determine VMI's admissions policy. *Id.* at 214a.

In its original ruling on liability, the court of appeals concluded that the Commonwealth had failed to point to "a stated policy justifying single-sex education in state-supported colleges and universities." Pet. App. 153a.[15] In so holding, the court of appeals appears to have presumed that a governmental objective supporting a gender-based classification can be considered by the courts only if it has been explicitly articulated by the state legislature itself. *Id.*

The court of appeals plainly erred in declining to treat VMI's reasoned decision to retain single-sex education as a component of a larger state policy. Even in cases involving challenges to *racial* classifications subject to *strict* scrutiny,

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[15]The court of appeals also pointed to a suggestion by Virginia's then-Attorney General to the effect that then-Governor Wilder had expressed "personal" reservations about VMI's admissions policy. Pet. App. 142a, 153a. Under Virginia law, however, neither the Governor nor the Attorney General has any authority to determine state policy with respect to the composition of VMI's student body. Rather, as the Commonwealth explained in its answer to the complaint filed by the United States in this case, "[t]he admissions policy of VMI is the exclusive province of the VMI Board of Visitors, subject only to the Virginia General Assembly as provided by law." Answer, ¶ 6 (I JA 29; L. 2). Moreover, then-Governor Wilder later made clear his support for both VMI and VWIL, and the current Governor, Lieutenant Governor, Attorney General, and General Assembly are fully supportive of VMI's (and VWIL's) single-sex admissions policies as part of Virginia's broad-based higher education system. *See, e.g.*, II DX 1-3, 5, 6, 11L, 11M, 11R (II JA 113-23, 125-26, 165-68, 181-84; L. 289-96, 323-26); *see also* Pet. App. 81a n.20 (then-Governor Wilder's "position in this Court has always been one supporting VMI's all male admissions policy").

this Court has consistently given full consideration to the justifications proffered by a State's political subdivisions, without suggesting that such justifications are *per se* invalid absent explicit endorsement from or articulation by the state legislature. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (opinion of O'Connor, J.); *id.* at 498-505 (opinion of the Court); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-78 (1986) (opinion of Powell, J.); *id.* at 287-89 (opinion of O'Connor, J.); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 311-14 (1978) (opinion of Powell, J.). It follows *a fortiori* that a State's political subdivision may, in the exercise of the powers delegated to it by the state legislature, and consistent with established state policies, choose the means by which to implement important and legitimate governmental objectives. VMI's decision to pursue the benefits of single-sex education and the VMI method is therefore entitled to consideration as an element of a larger important governmental objective, and the court of appeals' ruling to the contrary is incorrect.

As the district court correctly observed, "[t]he record in this case shows the Commonwealth's unambiguous and unequivocal support of single-sex education," and "the Commonwealth's position in this Court has always been supportive of VMI's all-male admissions policy because it adds to the diversity of choices in Virginia's higher education system." Pet. App. 81a. Thus, the Commonwealth (acting through the State Council of Higher Education and the governing boards of each of its colleges, including the VMI Board of Visitors) has chosen to pursue the legitimate governmental goals of providing diverse educational opportunities and the benefits of single-sex education and the VMI method. The first prong of the *Hogan* test is therefore satisfied, and the only remaining question is whether VMI's admissions policy is substantially related to the achievement of these important governmental objec-

tives.

III. VMI'S SINGLE-SEX ADMISSIONS POLICY IS SUBSTANTIALLY RELATED TO ACHIEVING THE IMPORTANT GOVERNMENTAL OBJECTIVES OF PROVIDING THE BENEFITS OF A SINGLE-SEX COLLEGE EDUCATION AND THE VMI METHOD AND ENHANCING DIVERSITY IN HIGHER EDUCATION

As the district court found, "VMI contributes to the diversity of Virginia's higher education in two related ways: (1) by providing an opportunity for single-sex education, and (2) through the unique VMI method of character development and leadership training." Pet. App. 188a. Both of these contributions to the breadth of Virginia's higher education system would be lost if VMI were to become coeducational.

It is self-evident that VMI's policy of limiting admission to men is substantially related to achieving the proven, positive, factually established benefits of single-sex education and the VMI method. Requiring VMI to become coeducational would, by definition, preclude it from providing a single-sex education, thus depriving VMI's students of the benefits provided by such an education without extending those benefits to anyone. As the court of appeals observed, "the only way to realize the benefits of homogeneity of gender is to limit admission to one gender." Pet. App. 22a.[16] Changing VMI's admissions policy would, therefore, entirely frustrate one of Virginia's legitimate and important educational goals by depriving students of an opportunity to learn in a single-sex

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[16]That fact serves to distinguish this case from *Hogan*, in which the record was "flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of [the State's] educational goals." 458 U.S. at 731.

environment.

Moreover, as both courts below found, women could not be admitted to VMI without eliminating the very aspects of its program that distinguish it from VPI and other institutions of higher education in Virginia. Pet. App. 6a-7a, 24a-25a, 146a-48a, 170a-73a, 227a, 233a-34a, 237a-39a. Even the Government concedes that coeducation would require substantial changes to VMI's method, including the introduction of dual-track physical education activities for women so as "to reflect the comparable effort of each gender," the creation of privacy rights on the basis of gender, and the elimination of "harassment" deemed inappropriate in a cross-gender context. II JA 99-103, 107-08. The Solicitor General disputes the extent and impact of those changes, but that factual issue was resolved against the Government by both courts below.

The evidence and findings at trial demonstrate that VMI's adversative method would necessarily have to undergo drastic modification if VMI were to become coeducational. As the district court explained, for example, the Marine Corps found that it was unable to maintain the harsh regimen of its boot camps -- which are similar in intensity to VMI's first-year indoctrination -- in a coeducational setting. Pet. App. 195a, 235a. Similarly, West Point modified and then abandoned the adversative model altogether after women were admitted, and it also rejected fixed physical training standards in favor of "comparable" training. Pet. App. 235a-241a. However effective the West Point system may now be in achieving the goals it serves, it cannot accomplish the same results as VMI, which uses different methods to stimulate and educate different types of individuals.

Thus, both courts below were plainly "justified in finding that if women were to be admitted, VMI would have to convert to a dual-track physical training program in order

to subject women to a program equal in effect to that of men." Pet. App. 146a. The result of this departure from VMI's core policy of egalitarianism would be to create perceptions of unequal treatment among cadets, leading to tensions and disparities in treatment that would be incompatible with VMI's educational method. *Id.* at 146a-47a.

In addition, the admission of women to VMI would necessarily entail creation of privacy rights for cadets, at least on gender grounds. Pet. App. 147a. This change would contradict the adversative method's emphasis on complete equality, absence of privacy, and close scrutiny by all other cadets.

Moreover, related aspects of the adversative method would necessarily undergo substantial modifications with the admission of women, because the harassment, scrutiny, and pressure that upperclass students impose on their juniors would undoubtedly "play out differently" when the pressure is imposed by a late adolescent male on a late adolescent female or vice versa. Pet. App. 147a. This "cross-sexual confrontation and interaction" would "introduc[e] additional elements of stress and distraction which are not accommodated by VMI's methodology" and would "significantly alter the character-building and leadership-development aspects of the VMI experience." Pet. App. 147a, 239a.

In short, the fundamental characteristics of VMI's educational method, including the adversative system, the total absence of privacy, and the strict egalitarianism that pervades all aspects of the program, would undergo radical change or disappear altogether with coeducation. It is simply "without a doubt that VMI's present methods of training and education would have to be changed as West Point's were." Pet. App. 172a n.8. As a consequence, the women admitted to VMI would be denied "the very opportunity they sought because the unique characteristics

of VMI's program would be destroyed by coeducation." Pet. App. 6a-7a. Indeed, as the district court observed, "if VMI were to admit women, it would become more similar to the military barracks at VPI, so its uniqueness would be lost." Pet. App. 173a. Thus, one of the experts explained after studying the educational options available in Virginia, "[t]ransforming VMI into a coeducational institution would significantly reduce the postsecondary educational choices available to men without materially altering the range of choices available to women." I DX 58 at 25 (I JA 1757).

The simple truth is that "VMI's mission can be accomplished only in a single-gender environment," Pet. App. 148a, and VMI's students respond most effectively to the VMI method. As a result, "[t]he classification for single-gender education at VMI is . . . directly related to achieving the results of an adversative method in a military environment," because "'the unique characteristics of VMI's program would be destroyed by coeducation.'" Pet. App. 6a-7a, 23a; *see also id.* at 146a-48a, 167a, 175a-76a. Thus, VMI's single-sex admissions policy is precisely tailored to the achievement of the Commonwealth's legitimate objectives, and the second prong of the *Hogan* test is satisfied in this case.

IV. THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE STATES TO OFFER PARALLEL SINGLE-SEX EDUCATIONAL OPPORTUNITIES TO MEMBERS OF EACH GENDER WITHOUT REGARD TO STUDENT INTEREST OR THE EXISTENCE OF OTHER PUBLIC AND PRIVATE EDUCATIONAL OPPORTUNITIES

A. The *Hogan* Test Is Satisfied By The Commonwealth's Showing That VMI's Single-Sex Admissions Policy Is Substantially Related To The Achievement Of Important Governmental Objectives

For the reasons set forth above, VMI's single-sex admis-

sions policy satisfies the two-pronged test enunciated in this Court's decision in *Hogan*. The court of appeals reached its contrary conclusion only by engrafting a third requirement onto the *Hogan* test, precluding States from offering any particular single-sex educational opportunity for members of one gender without proffering a justification for the absence of a "parallel" or "substantively comparable" program for members of the opposite gender. Pet. App. 17a, 155a. That holding goes beyond *Hogan*, which made clear that a State *may* "confer a benefit only upon one class" as long as the "classification is substantially related to achieving a legitimate and substantial goal," *i.e.*, as long as the two prongs of the *Hogan* test are satisfied. 458 U.S. at 724, 731 n.17.

In *Hogan*, of course, the State could not meet this requirement because, as a factual matter, the State's asserted goal was not "the actual purpose underlying the discriminatory classification" and because the single-sex admissions policy was *not* "necessary to reach any of [the university's] educational goals." 458 U.S. at 730, 731. The "uncontroverted record" in *Hogan* revealed "that admitting men to nursing classes [did] not affect teaching style" or "the performance of the female nursing students." *Id.* at 731. Indeed, as the Court explained, men were already permitted to attend and "participate fully in classes" at the university, so the single-sex admissions policy could not be defended on the ground that it was substantially related to achieving the benefits of single-sex education. *Id.*

In this case, by contrast, as explored thoroughly by the courts below, the record conclusively demonstrates that VMI's single-sex admissions policy *is* substantially related to (and indeed absolutely necessary to) the Commonwealth's actual and important goals of providing the enhanced diversity and distinct benefits of single-sex educa-

tion and the VMI method. Those goals would be frustrated, and the important advantages of VMI's single-sex educational method would be lost, if VMI were to become coeducational. VMI's single-sex admissions policy *is* "necessary to reach . . . [VMI's] educational goals," 458 U.S. at 731, and *Hogan* therefore requires rejection of the court of appeals' liability determination.

The invalidity of the court of appeals' liability determination is also evident from the mode of analysis followed by the Court in *Hogan*. The *Hogan* Court conducted a careful and detailed analysis of the proffered state objective and the relationship between that objective and the challenged classification. *See* 458 U.S. at 727-31. That analysis would have been wholly superfluous, however, if the absence of any state-provided single-sex educational opportunity for the excluded gender was *itself* sufficient to render the challenged admissions policy unconstitutional. Under the approach followed by the court of appeals in this case, the opinion in *Hogan* could have ended with its first footnote, which observed that "Mississippi maintains no other single-sex public university or college." *Id.* at 720 n.1. That the *Hogan* Court instead evaluated the legitimacy of the challenged single-sex admissions policy *without regard to the absence of an analogous single-sex program for members of the excluded gender* demonstrates the fallacy of the court of appeals' approach to the liability issue here.[17]

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[17]It is clear that the *Hogan* Court's refusal to require dual single-sex programs was not a mere oversight. Indeed, the court of appeals' opinion in *Hogan* had relied on that very reasoning, holding that "the fact that the state does not maintain a corresponding all-male nursing school deprives it of law as well as logic to support its argument that it is not discriminating between, or that it is affording equal protection to, the sexes." *Hogan v. Mississippi Univ. for Women*, 646 F.2d 1116, 1119 (5th Cir. 1981). Given that explicit statement

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If left uncorrected, the effect of the court of appeals' new test for liability will be to preclude States from offering the option of single-sex education to students of one gender unless a "substantively comparable" single-sex educational opportunity is offered to students of the other gender, regardless of the need or demand for such a program or the other educational opportunities available to that gender. Such a blow to single-sex education could well be devastating, doubly so because it would come at a time when educators and policymakers are turning more and more frequently to single-sex education as one solution for some of the ills that beset the Nation's public education system.

In Detroit, for example, the public school system sought to create all-male academies to respond to the special needs of inner-city boys, who consistently scored lower on standardized reading and math tests and had far more disciplinary problems than girls. *See* Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 Harv. L. Rev. 1741, 1743 (1992). That approach was supported by the findings of multiple educational researchers who have documented the benefits of single-sex education at the primary and secondary school levels as well as in college, and offered exciting possibilities for improving the dire status of public education in the inner cities.[18] Applying logic similar to that

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in the Fifth Circuit's opinion, this Court's refusal to adopt that reasoning in *Hogan* is highly significant.

[18]*See* Mikyong Kim & Rodolfo Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 J. HIGHER EDUC. 640, 661-62 (Nov./Dec. 1995); Richard Hawley, *A Case For Boys' Schools*, *in* SINGLE-SEX SCHOOLING: PROPONENTS SPEAK, A SPECIAL REPORT FROM THE OFFICE OF EDUCATIONAL

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used by the court of appeals in this case, however, a federal district court judge preliminarily enjoined the academies on the ground that they discriminated against girls, and the school district dropped the program rather than expend its scarce resources on costly litigation. *See Garrett v. Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991).

Despite the fate of the Detroit experiment, school districts in Maine, California, Maryland, and other locations across the nation are seeking to take advantage of the special benefits offered by single-sex education for some students and in some contexts.[19] Indeed, as part of its commitment

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RESEARCH & IMPROVEMENT, U.S. DEP'T OF EDUC. (Debra Hollinger & Rebecca Adamson, eds.) (hereinafter "DOE REPORT") 11, 11 (1992); Cornelius Riordan, *The Case For Single-Sex Schools, in* DOE REPORT 47, 48; Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. EDUC. PSYCH. 381, 393-94 (1986).

[19] *See, e.g.*, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., GROWING SMART: WHAT'S WORKING FOR GIRLS IN SCHOOL, EXECUTIVE SUMMARY AND ACTION GUIDE at 10 (1995) (classes separating girls and boys are now used in Virginia, New Hampshire, Illinois, New York, and California); Eric Wee, *A Lesson in Confidence: Va. Middle School Tries All-Girl Classes*, WASH. POST, May 1, 1995, at A1 (discussing all-girl classes in Manassas, Virginia; Ventura, California; and at Presque Isle High School in northern Maine); Ron Russell & John Wilson, *32 Girls + Science = Success*, DET. NEWS, July 18, 1995, at D1 (girls-only ninth grade physical science classes in Michigan public school); *Single-Sex Math Class Gaining In Popularity*, PHOENIX GAZETTE, Nov. 5, 1994, at A18 (Portsmouth, New Hampshire, school board initiating separate high school classes for boys and girls); Tim Poor, *Schools Try Same-Sex Classrooms*, ST. LOUIS POST-DISPATCH, Aug. 7, 1994, at 1A (boys and girls in grades 1-5

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to single-sex education, Virginia's General Assembly recently enacted a statute authorizing local school boards to offer single-sex classes in the Commonwealth's public schools. *See* Va. Code § 22.1-212.1:1. School districts have already responded by seeking to use single-sex classes in areas where educators believe they may be most beneficial. For example, Virginia's Prince William County is experimenting with all-girl math classes in order to increase the success rate, skills, confidence, and number of female math students.[20] These creative and laudable efforts to improve public education and respond to individualized and varied needs could well be precluded or hindered under the court of appeals' logic, with the result that the benefits of single-sex education will be limited to those relatively few students whose parents are able and willing to afford a private school education.

Likewise, the liability ruling below would preclude Virginia or any other State from offering a program like VWIL in the absence of a parallel single-sex program for men, even if there were a strong basis in fact for believing that the need and demand for a VWIL-like program was far greater than that for an analogous program for men. Indeed, under this Court's decision in *Norwood v. Harrison*, 413 U.S. 455 (1973), the state and federal governments could even be barred from providing financial or other assistance to women students attending *private* single-sex institutions, at least in the absence of proof that the private single-sex opportunities available to each gender were "substantively comparable." Such proof would be

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have separate classes in Baltimore, Maryland public school).

[20]*See* Wee, *supra* note 19, at A1.

virtually impossible to obtain in most States, given that there are only a handful of private men's colleges in the entire country.[21]

Finally, the reasoning of the court below will surely inhibit any State program, whether educational or not, that focuses on the particular needs of men or women. For example, a program designed to address the effects of domestic violence or pornography on women would be suspect in the absence of a comparable program for men, even if the available evidence clearly demonstrated that these effects are generally quite different for men and women. Battered women's shelters and other programs could be rendered unconstitutional in the absence of parallel programs for the opposite gender, even in the absence of any substantial need for such parallel programs. And even if the public resources could be found to fund these parallel programs, there would be no way to avoid constant litigation and judicial scrutiny regarding the comparability of the benefits being afforded to each gender.

For all these reasons, the court of appeals' liability determination is wrong under *Hogan* and will yield highly unfortunate consequences if it is allowed to stand. This Court should therefore reject the ruling on liability below.

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[21]At the time of the liability trial, there were five private men's colleges in the United States: Morehouse College, Rose-Hulman Institute of Technology, Hampden-Sydney College, Wabash College, and Deep Spring College (a two-year college). Stips. 44 (I JA 89; L. 71). Rose-Hulman became coeducational this year.

B. The Equal Protection Clause Does Not Require Creation Of Parallel Single-Sex Programs In The Absence Of Significant Demand Where The Overall Educational Opportunities Available To Each Gender Are Equivalent

Even if *Hogan* could be read to require justification for the absence of a parallel program for the gender not afforded access to a single-sex program, that burden was satisfied in this case. The courts below found that a separate women's program identical to VMI would be both pedagogically and financially impracticable because relatively few women would be interested in such a program. Pet. App. 27a, 73a, 75a. This fact, together with the extensive and diverse educational opportunities for women in Virginia and the prominence of female students in both publicly supported colleges and in private single-sex colleges in Virginia, satisfies any concern over whether educational resources are being deployed fairly and equitably in the Commonwealth.

Based on West Point's experience in recruiting for its non-adversative, coeducational program, the district court concluded (Pet. App. 174a) that "some women" might want to attend a *coeducational* VMI (with the modifications to the educational program entailed by coeducation). The court made no such finding, however, with respect to a single-sex adversative program for women adhering to the VMI model. To the contrary, the district court found that the evidence demonstrates little, if any, meaningful demand for such a program. *See* Pet. App. 73a, 75a & n.12.[22]

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[22]For example, Dr. Richard C. Richardson, an expert in higher education and the development of educational programs who chaired the most recent accreditation team for West Point, testified that, based on his interviews with female VPI cadets and on West Point's experience with female applicants, the

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Indeed, although there have been numerous women's colleges in the United States, there has never been *any* type of all-female military college in this country, let alone a women's military college based on the adversative model. Stips. 44 (I JA 89; L. 71). In fact, the record establishes that there is relatively little demand among women even for *non*-adversative residential ROTC programs in a military setting. In 1990, for example, only 44 women participated in VPI's coeducational Corps of Cadets, a tiny fraction of the more than 93,000 women college students in Virginia; fewer than 250 women were enrolled in residential ROTC military programs in the entire Nation. I DX 62L (I JA 1788; L. 233); *see also* II DX 88 (II JA 274; L. 344).

The court of appeals also concluded that the Government did not rebut cross-petitioners' showing that "if the state were to establish a women's VMI-type program, the program would attract an insufficient number of participants to make the program work." Pet. App. 27a. In the absence of meaningful demand, it would be pointless to insist that VMI be permitted to exist only if the State could show that a virtually identical program existed for women. As this Court observed in *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981), the Constitution does not require government to "engage in gestures of superficial equality." Rather, it requires only that government "treat similarly situated persons similarly." Women and men -- because of

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number of women students interested in a mirror-image VMI program "over a three or four-year period . . . could not possibly exceed 25 to 30 students." II Tr. 606, 613-15 (II JA 736, 742-44). With an institution of that size, of course, duplication of the VMI experience "was simply not possible." II Tr. 615 (II JA 745).

the vastly different extent to which they seek a VMI-like educational experience as opposed to other educational options -- are simply not "similarly situated" with respect to that type of education.

The Commonwealth's policy of providing single-sex college education and the VMI method for VMI's male students must also be evaluated in the context of the range of educational opportunities and public financial assistance afforded to women in Virginia's higher education system. A wide array of educational opportunities are available to women at Virginia's 14 coeducational public undergraduate institutions, including the opportunity to obtain degrees in all of the subjects offered at VMI (and more), and to participate in a coeducational residential Corps of Cadets and ROTC program at VPI. Indeed, substantially more women than men enjoy the benefits of the Commonwealth's public system of higher education. Pet. App. 187a.[23]

Moreover, analysis of the educational opportunities for women in Virginia would be incomplete without consideration of private colleges and universities that receive some form of direct or indirect assistance from Virginia. The Commonwealth's policy is that "'[h]igher education resources should be viewed as a whole -- public and private,'" and "Virginia relies on its independent institutions [of higher education] to offer students choices and meet the educational needs of people in the Commonwealth." Pet.

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[23]According to recent data published by the U.S. Department of Education, 83,395 women and 74,918 men were enrolled as full-time students in Virginia's public institutions of higher education in the Fall of 1991; the corresponding numbers for part-time students were 81,745 women and 58,049 men. *See* U.S. DEP'T OF EDUC., NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 195 (1994). Preliminary data reveal similar results for 1992. *Id.*

App. 191a; *see* Stips. 26, 28-32 (I JA 71, 73-77; L. 53, 55-59); *supra* pp. 7-8.

As noted above, there are four private four-year women's colleges (and only one private men's college) in Virginia, and students at each of these women's colleges have the option of participating in an ROTC program. The Commonwealth provides substantial financial assistance to its female residents who choose to attend one of these private women's colleges. *Supra* pp. 8-9; Pet. App. 190a-91a.[24] And women take advantage of these opportunities to a far greater extent than men. In the Fall of 1989, for example, 3850 women, but only 944 men, were enrolled in private single-sex institutions in Virginia. Pet. App. 189a. Thus, women have a *greater* range of single-sex educational options in Virginia than men, and VMI helps fill a gap created by the private sector's failure to provide greater or more attractive single-sex opportunities for male college students. In effect, VMI's males-only admissions policy "serves to roughly 'equalize'" overall single-sex educational opportunities in Virginia for men and women, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 473 (1981) (plurality opinion), and it is permissible for that reason as well.

CONCLUSION

Virginia's higher education system consists of a wide array of educational choices. The predominant segment of this system is coeducational, including an excellent and demanding coeducational Corps of Cadets program at VPI. A

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[24]By the same token, VMI derives most of its income from sources other than state appropriations. In the 1991-92 school year, for example, VMI derived less than 31% of its total operating budget from state appropriations, grants, and contracts. *See* II DX 21.

number of single-sex options for women also exist, with various forms of public financial assistance, at Virginia's several outstanding private women's colleges. VMI, which is publicly supported, but which also receives substantial private support, offers a valuable and effective single-sex educational option for men. Since its program has been proven to be highly effective in educating some young men and can only be provided in a single-sex environment, VMI's single-sex admissions policy is substantially related to the achievement of established and important governmental objectives. VMI's single-sex admissions policy therefore does not violate the Equal Protection Clause. Accordingly, the court of appeals' finding of liability should be rejected, and the judgment below should be affirmed on that ground.

Respectfully submitted.

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